Supreme Court, U.S.
FILED
(1)
991690 APR 19 2000
No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

CITY OF HOUSTON,

Petitioner,

v.

JOHN E. KOLB, JAMES W. McCARTNEY, WILLIAM M. LINDEN, RAYMOND S. MAISLIN, O. SCOTT ROGERS, BETTY PULASKI WESTON, B. RED, INC., RACHEL S. KOLB, DAVE KAMINSKY, ROBERT I. KAMINSKY, STEPHEN KAMINSKY, CHARLES D. KOLB, JAMES R. SUD, TRUSTEES OF THE JUDITH SUD & BETTY P. SUD TRUST, AND J. E. ROUSSEL,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The Fourteenth Supreme Judicial District Of Texas

PETITION FOR A WRIT OF CERTIORARI

C. ROBERT HEATH
Counsel of Record
LISA R. ESKOW
BICKERSTAFF, HEATH, SMILEY, POLLAN, KEVER & McDANIEL, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701-2443
(512) 472-8021
(512) 320-5638 [Fax]

ANTHONY W. HALL, JR.
City Attorney
ANDREA CHAN
Assistant City Attorney
City of Houston, Texas
Legal Department
P.O. Box 1562
Houston, Texas 77251-1562
(713) 247-2000
(713) 247-1017 [Fax]

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

69 pp

QUESTIONS PRESENTED

1. Has a landowner applying for a subdivision plat submitted a meaningful application for purposes of ripening a takings claim when he (1) refuses the City Planning Commission's request that the plat reflect the existence of a proposed freeway crossing part of the tract and thus (2) never submits any proposal showing what development is possible without encroaching on the freeway corridor?

2. For purposes of ripeness, is it permissible for a landowner to circumvent the traditional requirement of seeking, and being denied, a permit or variance prior to litigating a takings claim by claiming that city staff members who are not on the Planning Commission and have no decision-making authority told him that the city would not approve his application for a subdivision plat without dedication of right-of-way for a proposed freeway?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 2

Statement 2

A. Background of the Alleged Taking 2

B. Proceedings Below 4

Reasons for Granting the Petition 7

I. This Court has jurisdiction over the petition 7

II. This Court should not condone the Texas court of appeals' evisceration of the ripeness doctrine 9

III. This Court should not relax the ripeness requirement by permitting an applicant to rely on a statement of a staff member rather than a formal ruling by city decisionmakers 12

IV. The writ should issue to halt Texas' departure from the takings jurisprudence established by this Court and followed by the highest courts of other states 14

Conclusion 16

Appendices

Appendix A: Opinion on Rehearing of the Court of Appeals of Texas, Houston (14th Dist.) .....App. 1

TABLE OF CONTENTS – Continued

-Page

Appendix B: Order of the Supreme Court of Texas denying petition for review.....App. 19

Appendix C: Judgment of the County Civil Court at Law No. Four, Harris County, Texas.....App. 21

Appendix D: Findings of Fact and Conclusions of Law filed by the County Civil Court at Law No. Four, Harris County, Texas .....App. 25

Appendix E: Order of the Supreme Court of Texas overruling the motion for rehearing ...App. 37

Appendix F: Excerpt from Defendant City of Houston's Motion to Dismiss for Lack of Subject Matter Jurisdiction in Cause No. 637,756, *John E. Kolb, et al. v. The City of Houston*, in the County Civil Court at Law No. Four, Harris County, Texas .....App. 39

Appendix G: Excerpt from Brief of Appellant in No. 14-97-00133-CV, *City of Houston v. John E. Kolb, et al.*, in the Court of Appeals for the 14th District of Texas, Houston, Texas .....App. 41

Appendix H: Excerpt from Petition for Review of the City of Houston in No. 99-0156, *City of Houston v. John E. Kolb, et al.*, in the Supreme Court of Texas .....App. 44

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 9

City of Houston v. Kolb, 982 S.W.2d 949 (Tex. App. – Houston [14th Dist.] 1999, pet. denied) ..... *passim*

Hoepker v. City of Madison Plan Comm'n, 563 N.W.2d 145 (Wis. 1997) 15

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 15

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 9, 12, 13, 14

Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998) 5, 6, 8

Michigan v. Long, 463 U.S. 1032 (1983) 7, 8, 9

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) 8, 9

Palazzolo v. State, 746 A.2d 707 (R.I. 2000) 15

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 10, 12

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 15

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 9, 11, 14

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 8, 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

TEX. LOC. GOV'T CODE § 212.010(a)(2) (Vernon 1999) 11

OTHER

Haffner, Julia C., *Suitum v. Tahoe Regional Planning Agency: The United States Supreme Court Revisits Ripeness in the Regulatory Takings Context*, 11 TUL. ENVTL. L.J. 129 (1997) 14

O'Connor, Sandra Day, *Our Judicial Federalism*, 35 CASE WESTERN RES. L. REV. 1 (1984) 8

PETITION FOR A WRIT OF CERTIORARI

The City of Houston, Texas, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 982 S.W.2d 949. The judgment, findings, and conclusions of the district court (App. 21, 25) are unreported.

JURISDICTION

The Court of Appeals for the Fourteenth Supreme Judicial District of Texas entered judgment on January 7, 1999. App. 1. A timely petition for review was filed in the Supreme Court of Texas and was denied on December 2, 1999. App. 19. The motion for rehearing in the Supreme Court of Texas was denied on January 20, 2000. App. 37. As the Texas Supreme Court declined to exercise its discretion to review the case, the Fourteenth Court of Appeals was the highest Texas court in which a decision could be had. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the United States Constitution provides in relevant part "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

STATEMENT

This case arose from the City of Houston's denial of an application for a subdivision plat because the plat application did not reflect the route of a proposed freeway. It poses the issue of when a takings claim becomes ripe.

A. Background of the Alleged Taking.

John Kolb[1] is the owner of an approximate 314-acre tract in northwest Harris County, Texas. Although the land is outside the city limits of the City of Houston, it is within Houston's extraterritorial jurisdiction, and thus the city must approve any proposal to subdivide the land. In 1993, Kolb submitted an application for a subdivision

[1] Ownership of the tract is vested in a trust and various individuals. For purposes of this petition, they are referred to collectively as "Kolb," who is listed first in the caption of the case. The names of all parties are listed on the cover of this petition.

plat to the City of Houston, seeking to subdivide the tract for residential development.

In reviewing the application, the city planning staff noted that the tract was bisected by the Grand Parkway, a proposed 170-mile, controlled-access, state highway that will loop around the City of Houston. Accordingly, the staff placed a note on the plat suggesting that Kolb "contact Grand Parkway Association and coordinate." RR 249.[2] Additionally, the staff forwarded the application to the Grand Parkway Association for its comments on the application. RR 19-20. The Grand Parkway Association is a non-profit corporation created by the Texas Department of Highways and Public Transportation "to secure and obtain rights-of-way" and "to assist in the planning and designing of [the Grand Parkway]." State Highway and Public Transportation Commission of Texas Minute Order No. 82325 (P. Ex. 3). The basic strategy is to obtain right-of-way by donation, although some tracts have been acquired by condemnation. RR 273-274. The final route of the Grand Parkway had not been determined at the time the subdivision plat was filed and construction of this segment had not yet been authorized; however, the basic highway alignment corridor across the Kolb property had been public for several years. RR 57, 20; P. Ex. 12. The state had obtained a 300-foot wide right-of-way for the

---

[2] Following Texas practice, the portion of the record prepared by the court reporter (e.g., the transcript of testimony) is the "Reporter's Record" and is cited as "RR ___." The portion prepared by the clerk (e.g., the motions, orders, and similar papers filed in the cause) is the "Clerk's Record" and is cited as "CR ___."

freeway across the property located immediately to the east of the Kolb tract. RR 91.

After reviewing the proposed plat, the Grand Parkway Association informed the city by letter dated August 12, 1993, that it "takes exception to this plat" and noted that the "subdivision, as currently proposed, would prohibit use of the Grand Parkway (SH 99) alignment corridor which has been proposed in this area of Harris County since 1985." P. Ex. 12. That same day the Houston Planning Commission, which is the city board that rules on subdivision plat applications, denied Kolb's original application stating it did not conform to the 1992 Major Thoroughfare and Freeway Plan of the City of Houston and noting that some block lengths shown on the plat exceeded the maximum permissible length. RR 351. Kolb revised the application to reduce the length of the blocks; however, he still did not show the location of the proposed Grand Parkway on the plat. RR 352. On September 9, 1993, the Planning Commission again denied the revised application because it did not reflect the location of the proposed freeway. Ex. P-18.

B. Proceedings Below.

Kolb filed suit on August 25, 1994, claiming that the denial of his application for a subdivision plat represented a taking without just compensation under the state and federal constitutions. CR 18. The City of Houston filed a motion to dismiss raising the ripeness issue, but the motion was denied. CR 5-61, 197; App. 39. After a bench trial, the state district court found that the September 9, 1993, denial of the application for a subdivision

plat was a taking or damaging under article I, section 17, of the Texas Constitution.[3] CR 313; App. 22. The damage issue was referred to a jury, which returned a verdict for $1,305,819 plus interest and attorneys' fees. *Id.* That figure is the difference the plaintiff's expert found between the value of the entire tract if it were available for residential development and its value as agricultural property. RR. 175.

The city appealed to the state's Fourteenth Court of Appeals. The primary issue in the court of appeals was "whether the case was ripe for the trial court's consideration." *City of Houston v. Kolb*, 982 S.W.2d 949, 952 (Tex. App. – Houston [14th Dist.] 1999, pet. denied), App. 4; *see also* App. 41. The court of appeals based its decision on *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), the leading and most recent Texas Supreme Court case on ripeness of takings claims.

In *Mayhew*, the Texas Supreme Court found that it was unnecessary, in the context of that case, for the Mayhews to submit further applications and to seek variances because they had spent a year in negotiation with the town, compromised with the city, altered their original proposal, and filed a modified application to the town council – all at a cost of more than $500,000 – and that

---

[3] Article I, section 17, of the Texas Constitution, the state's equivalent provision to the Fifth Amendment's takings clause, provides in part:

> No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person. . . .

further applications would have been futile. *See Kolb*, 982 S.W.2d at 953 (citing *Mayhew*, 964 S.W.2d at 931-932); App. 8. The court of appeals in this case noted that there had been testimony that the reason for the denial of the Kolb's application was the conflict between the proposed subdivision and the plans for the Grand Parkway, that there was testimony from a city staff member that the city would require Kolb to dedicate at least 100 feet of right-of-way for the Grand Parkway before his application would be approved, and that the Grand Parkway Association protected the alignment of the Grand Parkway to decrease the costs of acquiring right-of-way.[4] *See Kolb*, 982 S.W.2d at 953-54; App. 8-9. The court of appeals also concluded that it would be futile to seek a variance from the city to move the freeway alignment since the state, rather than the city, had authority to establish the path of the highway. *Id.* at 954; App. 9-10. The court said:

> After the Kolbs' second application was denied, the City's position was clear – the Kolbs' application would not be approved unless a right-of-way was dedicated to the City for the Grand Parkway. Moreover, the City did not have the power or authority to relocate or alter the Grand Parkway's proposed pathway. We therefore hold that, to require the Kolbs to seek further variances or to hold a public hearing in front of the City's planning and zoning commission, an entity that has absolutely no power in relation

[4] The actual testimony was that avoiding development in the corridor would avoid an increase in the cost of acquiring the land *and* would avoid disruption in the lives of the people whose homes would ultimately be taken. RR 87-8.

> to the Grand Parkway, would have been pointless.

Kolb, 982 S.W.2d at 954; App. 9-10.

The city filed a petition for review asking the Texas Supreme Court to review the case. Again, the ripeness issue was raised as the city's primary point. App. 44. The petition for review was denied on December 2, 1999, and the city's motion for rehearing was denied on January 20, 2000. App. 19, 37.

REASONS FOR GRANTING THE PETITION

I. This Court has jurisdiction over the petition.

Although the court of appeals' opinion appears to rest on a Texas Supreme Court construction of a Texas constitutional provision, there is clear jurisdiction for this Court to review the decision under the principles articulated in *Michigan v. Long*, 463 U.S. 1032 (1983). There the Court determined that:

> when . . . a state court decision fairly appears . . . to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed the federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the

> purpose of guidance, and do not themselves compel the result that the court has reached.

Long, 463 U.S. at 1040-41. No such plain statement exists in *Kolb*. To the contrary, the controlling Texas authority expressly acknowledges that it is based on federal law.

The court of appeals' opinion for which the writ of certiorari is sought is squarely based on the ripeness standard articulated by a Texas Supreme Court case – *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998). Thus, to determine if the rationale of the court of appeals' decision is based on or interwoven with federal law, it is necessary to look to *Mayhew*. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 10 n.5 (1990) (determining federal question jurisdiction by looking to rationale of state supreme court case on which state intermediate appellate court relied).

There is no doubt that *Mayhew*, which states the Texas standard on ripeness of takings claims, is squarely based on federal law. The Texas Supreme Court expressly states that "in determining the ripeness of the . . . regulatory takings claims . . . *we apply federal jurisprudence.*" *Mayhew*, 964 S.W.2d at 929 n.1 (emphasis added). Consequently, *Kolb*, which rests on *Mayhew*, fits firmly within the *Long* standard for this Court's jurisdiction. *See also Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) ("[A]t the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue. . . . "); Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE WESTERN RES. L.

REV. 1, 6 (1984) ("If a state court holds that a particular state action violates state law *because* it violates a parallel provision of federal law, then the Supreme Court has jurisdiction to review the case"). Under this Court's precedents in *Long*, *Milkovich*, and *Zacchini*, it has clear jurisdiction to hear this case.

II. This Court should not condone the Texas court of appeals' evisceration of the ripeness doctrine.

While ripeness is a requirement for any claim, it is a particularly important concept in takings jurisprudence. Not only does it determine whether an Article III case or controversy exists, but it also is a necessary component in determining whether a taking has, in fact, occurred and, if so, how much has been taken.

At some point a land use regulation or development permit denial can go too far and become so onerous that it has the same effect as appropriating the property by eminent domain or physical possession. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 (1985). However, a court cannot know if a regulatory scheme has gone too far, and thus effected a taking, until there is a final decision showing how the regulations will apply to the property at issue. *See id.* at 200; *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 (1986). Generally, this will require both submission and final denial of a meaningful application and application for and denial of relevant variances. *See, e.g., Hamilton Bank*, 473 U.S. at 190; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Just because a city denies one intensity of use, it does not mean that it would deny some

other less intense, but still reasonably beneficial, use. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 136-37 (1978) (stating that denial of application to build fifty-story tower over Grand Central Terminal does not suggest that any structure would be disallowed). Thus, in order to establish a ripe takings claim, a landowner must submit and obtain a ruling on one or more applications that establish what type of development is permissible. Kolb established one type of development that would not be permitted – namely, development that ignores a proposed freeway. He never established or even attempted to establish what type of development, if any, would be permissible. As such, his takings claim is not ripe.

Here, Kolb sought to construct a residential subdivision directly in the path of a proposed freeway; however, he drafted the application as if the proposal to construct the freeway did not exist. In effect, Kolb proposed to sell homesites and to construct a residential street grid in the path of the freeway. The Planning Commission rejected Kolb's application because it failed to recognize the route of the proposed freeway. After the initial rejection, Kolb revised his application to address relatively minor issues; yet, he still refused to address the fundamental barrier to approval – namely, the relationship between the subdivision and the proposed freeway. Kolb never revised his application to show how the subdivision plan affected the freeway; nor did he present a plan that recognized the freeway's path. Instead, he ignored the freeway.

This Court has made clear that simply going through the motions will not suffice in the takings context. Applicants for development must present the reviewing board with a meaningful opportunity to evaluate the proposal

in the context of the city's general plan, including the plan for streets and highways. *See* TEX. LOC. GOV'T CODE § 212.010(a)(2) (Vernon 1999) (city shall approve plat if it conforms to the general plan for extension of roads, streets, and highways). Because Kolb failed to submit an application that recognized and addressed the proposed freeway, as required by state law and by common sense, he never submitted a meaningful application.[5] In assessing an applicant's refusal to seek variances to zoning requirements, this Court concluded that:

> in the face of respondent's refusal to follow the procedures for requesting a variance, and its refusal to provide specific information about the variances it would require, respondent hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted.

Hamilton Bank, 473 U.S. at 190. Here, since Kolb refused to submit an application that recognized and addressed the existence of the proposed freeway, he cannot claim that there was a final decision that no development would be permitted.

For a takings claim to be ripe, a landowner must emerge from the application process with a ruling that

---

[5] The Texas court of appeals concluded that Kolb had submitted a "meaningful" application; however, that discussion related to the issue of whether the application was prepared by a civil engineer. *Kolb*, 982 S.W.2d at 952; App. 5. The argument in this Court does not relate to the fact issue of whether an engineer prepared the application; rather, the contention here is that the application was not meaningful for ripeness purposes because it omitted any reference to the proposed freeway.

establishes what type of development, if any, is permissible. *See, e.g., Yolo County*, 477 U.S. at 350 (stating that a court cannot determine if a taking has occurred until it "knows what use, if any, may be made of the affected property"); *Penn Central*, 438 U.S. at 137 (noting that because the applicants did not seek approval of a smaller structure, the court did not know whether they would be denied any use of the airspace above the Terminal). Although the trial court made fifty-seven findings of fact, none says what type of development would be permissible. CR 348-54. It is unclear, for example, if the property could be developed for residential, commercial, or industrial purposes that conform to the freeway plan.

The Texas court divorced the ripeness requirement from its underlying purpose – i.e., to ascertain what use is permissible and thus determine whether a taking occurred. As a result of the court of appeals' decision, little more than a ticket-punching formality is required in Texas before plaintiffs can enter the courthouse doors with a federal or state constitutional takings claim. The opinion, if permitted to stand, will represent a serious erosion of the ripeness doctrine that is such an integral part of this Court's takings jurisprudence.

III. This Court should not relax the ripeness requirement by permitting an applicant to rely on a statement of a staff member rather than a formal ruling by city decisionmakers.

In determining that a taking had occurred, both the trial court and court of appeals relied heavily on a

finding that the city conditioned approval of Kolb's subdivision plat application on dedication of right-of-way for the Grand Parkway. *Kolb*, 982 S.W.2d at 954; App. 9-10; CR 353 (finding 43). Indeed, this appears to be the trigger element to these courts' determination that the city's denial of the plat constituted a taking. *See Kolb*, 982 S.W.2d at 954; App. 9-10 ("After the Kolbs' second application was denied, the City's position was clear – the Kolbs' application would not be approved unless a right-of-way was dedicated to the City for the Grand Parkway.").[6]

This finding, however, does not rest on any vote or analogous formal action by the Planning Commission. Instead, it is based on the testimony of city staff members and the landowner's statement as to what those staff members told him. RR 22, 113-16, 126-27.

Of course, no planning staff member can make this decision; only the Planning Commission appointed by the city council decides dedication issues. Statements by staff members do not constitute the "final and authoritative determination" required by this Court's jurisprudence. *E.g., Yolo County*, 477 U.S. at 348. Rather than rely on staff

---

[6] The trial court and the court of appeals may have improperly mixed exaction jurisprudence with the related, but somewhat broader, doctrine relating to regulatory takings generally. Specifically, the trial court found a taking of the entire tract because it believed the city would require dedication of a portion of the tract for freeway right-of-way. It is questionable whether this hybrid legal analysis on the merits is permissible. Regardless, this Court need not decide that issue because the takings claim is not ripe.

members' understanding or speculation of what the Commission's stance will be, landowners must present a formal application and give the decisionmaking authority the opportunity to approve or deny it. By not requiring the landowner to submit a meaningful application and pursue it to "a final and authoritative determination," the Texas court circumvented well-established procedural safeguards in the takings context and dramatically departed from this Court's ripeness jurisprudence.

IV. The writ should issue to halt Texas' departure from the takings jurisprudence established by this Court and followed by the highest courts of other states.

Both from an analytical and a practical perspective, ripeness is an essential part of takings jurisprudence. Unless a claim is ripe, a court has no reasoned basis on which to determine if a taking has occurred. *See, e.g., Yolo County*, 477 U.S. at 350; *Hamilton Bank*, 473 U.S. at 200. As a practical matter, courts decide the overwhelming majority of takings cases on the ripeness issue. *See* Julia C. Haffner, *Suitum v. Tahoe Regional Planning Agency: The United States Supreme Court Revisits Ripeness in the Regulatory Takings Context*, 11 TUL. ENVTL. L. J. 129, 140 (1997).

This Texas case strikes at the heart of this Court's ripeness jurisprudence and one of its most fundamental concepts – the need for a meaningful application pursued through final rejection. That concept was, until now, firmly established and universally recognized. In fact, the concept is so firmly engrained in takings law that this

Court's recent cases have gone on to address more esoteric ripeness issues, such as whether landowners must pursue permit options created after suit is filed (*see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1011-13 (1992)), and whether a government's grant of alternative value – e.g., transferable development rights – impacts the ripeness analysis (*see Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997)). With *Kolb*, however, Texas bucks the trend and brings takings jurisprudence back to step one, turning fundamental ripeness principles on their head. Under *Kolb*'s reasoning, there is no need for a landowner to submit a meaningful application for development, much less obtain a final decision by a lawful decisionmaker. If the Texas rule is the law, ripeness is no longer an issue in takings cases.

Texas is out of step with both this Court's teaching and the understanding of courts of last resort in other states. *See, e.g., Palazzolo v. State*, 746 A.2d 707, 714 (R.I. 2000) (holding that failure to apply for use that would require filling of less than entirety of wetlands tract prevented claim from being ripe); *Hoepker v. City of Madison Plan Comm'n*, 209 563 N.W.2d 145, 153 (Wis. 1997) (takings claim was not ripe where exact location of open space corridor that would pass through the tract was unknown). This Court should grant the writ and reverse Texas' significant and fundamental departure from takings jurisprudence.

CONCLUSION

For the aforementioned reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

C. ROBERT HEATH
Counsel of Record
LISA R. ESKOW
BICKERSTAFF, HEATH, SMILEY, POLLAN, KEVER & MCDANIEL, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701-2443
(512) 472-8021
(512) 320-5638 [Fax]

ANTHONY W. HALL, JR.
City Attorney
ANDREA CHAN
Assistant City Attorney
City of Houston, Texas
Legal Department
P.O. Box 1562
Houston, Texas 77251-1562
(713) 247-2000
(713) 247-1017 [Fax]

APPENDICES

APPENDIX A

The CITY OF HOUSTON, Appellant,

v.

John E. KOLB, James W. McCartney, William M. Linden, Raymond S. Maislin, O. Scott Rogers, Betty Pulaski Weston, B. Red, Inc., Rachel S. Kolb, Dave Kaminsky, Robert I. Kaminsky, Stephen Kaminsky, Charles D. Kolb, James R. Sud, Trustees of The Judith Sud & Betty P. Sud Trust, & J.E. Roussel, Appellees.

No. 14-97-00133-CV.
Court of Appeals of Texas,
Houston (14th Dist.).
Jan. 7, 1999.

Before Chief Justice MURPHY and Justices HUDSON and O'NEILL.

OPINION ON REHEARING

J. HARVEY HUDSON, Justice.

This is an appeal from a judgment against the City of Houston ("the City") based upon inverse condemnation of a piece of property. The trial court determined there was a "taking" or "damaging" of the property as a matter of law and the jury assessed actual damages in the amount of $1,305,819 plus pre-and post-judgment interest and attorney fees. In three points of error, the City argues: (1) the controversy was not ripe for judicial determination; (2) there was insufficient evidence that seeking additional administrative remedies would be futile; and (3) the trial court erred in submitting the compensable damages issue to the jury. We affirm.

FACTUAL BACKGROUND

In 1973, appellees (collectively referred to as the "Kolbs") purchased 640 acres of land located within the extraterritorial jurisdiction of Houston.[1] The northern half of this property was subsequently developed. In 1993, the Kolbs submitted an application for a subdivision plat to the City of Houston, requesting to subdivide the remaining 314 acres. Because the Kolbs' property was in the general vicinity of the proposed Grand Parkway,[2] the application was forwarded to the Grand Parkway Association for comment.[3] The Grand Parkway Association reviewed the application and refused to grant its approval because the proposed subdivision "would prohibit use of the Grand Parkway alignment corridor." Based upon these comments, the City's Planning Commission denied the application, stating "Plat does not conform to the approved Major Thoroughfare and Freeway Plan." The application was also denied due to excessive block lengths.

---

[1] Extraterritorial jurisdiction refers to "the unincorporated territory extending 5 miles beyond the City limits of the City." Houston, Texas, Ordinances Ch. 42 Art. I § 42-7(21).

[2] The Grand Parkway, which has been designated as State Highway 99, is a proposed six (6) lane, non-toll highway that will loop around the City of Houston. The proposed highway is approximately 170 miles in length. *See* Finding of Fact 1.

[3] The Grand Parkway Association and the City of Houston have an arrangement whereby any subdivision or development plat that is in the vicinity of the proposed alignment for the Grand Parkway which is submitted to the City of Houston's Planning and Zoning Commission, is forwarded to the Grand Parkway Association for its review and comment. *See* Finding of Fact 28.

One month later, the Kolbs resubmitted the application and requested a variance to allow the establishment of excessive block lengths. The Kolbs' application was again denied, stating solely, "Plat does not conform to the approved Major Thoroughfare and Freeway Plan." The Kolbs then filed this suit seeking a judicial determination that their property had been "taken" or "damaged" according to Article I, § 17 of the Texas Constitution and seeking just compensation.

Prior to trial, the City filed a motion to dismiss for lack of subject matter jurisdiction, alleging the Kolbs' claims were not ripe for judicial review. This motion was denied. The trial court held a hearing solely on the issue of whether a "taking" had occurred. After hearing the evidence, the trial court determined that the City had "taken" or "damaged" the Kolbs' property as a matter of law. A jury was then selected and the case proceeded on the issue of damages. After the close of evidence, the jury awarded $1.3 million in actual damages, plus attorney fees and pre- and post-judgment interest.

STANDARD OF REVIEW

In three points of error, the City challenges the factual sufficiency of the evidence. In reviewing the factual sufficiency of the evidence, we must consider and weigh all the evidence and should set aside the judgment only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex.1986). We will review fact findings in a bench trial for legal and factual sufficiency of the evidence by the same standards used in reviewing the

evidence supporting a jury's verdict. *See Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex.1996). The trial court's conclusions of law, however, will be examined under a de novo standard. *See Piazza v. City of Granger*, 909 S.W.2d 529, 532 (Tex. App. – Austin 1995, no writ). In other words, we will follow a trial court's conclusion of law unless it is erroneous as a matter of law. *See id.*

RIPENESS

The primary issue on appeal is whether the case was ripe for the trial court's consideration.[4] The City contends the case was not ripe because "no good faith or legally sufficient effort was made to comply with or obtain a final administrative ruling prior to filing the lawsuit." The City contends the Kolbs should have pursued their development request further than they did by either requesting a variance and/or a public hearing or discussing other alternatives with the City. The Kolbs, on the other hand, argue that seeking further administrative rulings would have been futile.

"A controversy in administrative law is 'ripe' for the courts when it has 'legally matured' within its province." *City of El Paso v. Madero Dev.*, 803 S.W.2d 396, 398 (Tex. App. – El Paso 1991, writ denied). "The ripeness doctrine conserves judicial time and resources for real and current controversies, rather than abstract, hypothetical, or remote disputes." *Mayhew v. Town of Sunnyvale*, 964

---

[4] The issue of whether there was a "taking" has not been challenged by the City and therefore is not before this court for determination.

S.W.2d 922, 928 (Tex.1998). "In order for a regulatory takings claim to be ripe, there must be a final decision regarding the application of the regulations to the property at issue." *Id.* at 929. "A 'final decision' usually requires both a rejected development plan and the denial of a variance from the controlling regulations." *Id.* Here, the City argues the Kolbs did not give the City the opportunity to make a final decision because they never filed a meaningful application for a subdivision plat and never sought a variance in relation to the Grand Parkway.

The City repeatedly asserts in its brief that the Kolbs' initial application was not prepared by an engineer. The City bases its claim on an affidavit from Vernon G. Henry, former Senior Planner for the City of Houston, stating that, in his opinion, "[t]here is no evidence that a civil engineer was involved in the formulation of the plat with respect to the evaluation of utility services and storm water drainage/detention options and public agency requirements. Indeed there was no evidence that any consideration had been given to these important and necessary elements." However, the Kolbs rebutted this attack by filing the affidavit of John Kolb, stating "Mr. Henry is completely in error when he states that the application for the Park Place Northwest Subdivision was not a meaningful plat. It was a meaningful plat in that it was submitted in good faith, had been prepared at substantial cost to the landowners by a professional engineer . . . " In its findings of fact, the trial court concluded that the original plat was meaningful and prepared by Charles Kalkomey, an engineer with experience in residential subdivision development. As the fact finder, the trial court was entitled to resolve any conflicts in the evidence in

favor of the Kolbs and we will not interfere with this decision. *See Taub v. City of Deer Park*, 912 S.W.2d 395, 399 (Tex. App. – Houston [14th Dist.] 1995, no writ).

The record shows the Kolbs did not apply for a variance in relation to the Grand Parkway. In fact, the Kolbs concede they never filed a variance; however, they argue that requesting a variance in relation to the Grand Parkway would have been futile. The Texas Supreme Court has recently recognized that "futile variance requests or reapplications are not required." *Mayhew*, 964 S.W.2d at 929. The plaintiffs in *Mayhew* owned approximately 1,196 acres of land in Sunnyvale. *See id.* at 925. This land had been used for ranching but, in 1985, the Mayhews began discussions with various Town officials seeking permission to proceed with residential development on the land. *See id.* The Mayhews told the officials that a planned development would not be feasible under the current one-unit-per-acre zoning policy of the Town. *See id.* at 926. In 1986, the Town amended its zoning ordinances to allow planned developments with densities in excess of one dwelling-unit per acre. *See id.* The Mayhews submitted their planned development proposal to the Town in July, 1986, requesting permission to build between 3,650 and 5,025 units on the land. *See id.* A planning and engineering firm initially reviewed the proposal and recommended its approval to the Town's planning and zoning commission. *See id.* The commission, however, denied the application. *See id.* The Town council then appointed a committee to negotiate with the Mayhews and both sides tentatively agreed to a compromise development of 3,600 units. *See id.* The Town council met to consider the compromise in January 1987. *See id.* At the meeting, the

Mayhews told the council that anything less than an approval for 3,600 units would be considered an outright denial. *See id.* The council voted to deny the Mayhews' proposal despite the prior compromise agreement. *See id.*

The Mayhews subsequently sued the Town, alleging among other things that the Town's decision was a taking of their property without payment of just or adequate compensation. *See id.* The Town moved for summary judgment and the trial court granted the motion. *See id.* However, the intermediate appellate court reversed the summary judgment on the Mayhew's constitutional claims against the Town. *See id.* On remand, the trial court concluded the case was ripe for adjudication and the Town's decision to deny the application was an unconstitutional taking. *See id.* at 927. The intermediate appellate court reversed, holding the claims were not ripe for review. *See id.* at 928. The court also concluded that, even if the Mayhews' claims were ripe, the evidence was insufficient to support the trial court's findings. *See id.*

The Supreme Court initially addressed the question of whether the Mayhews' claims were ripe for judicial review. *See id.* The Town argued that the Mayhews' claims regarding the denial of their application were not ripe because the Mayhews submitted only one planned development application and did not thereafter reapply for development or submit a variance. *See id.* at 931. The Mayhews, on the other hand, argued that their application and amended request for 3,600 units were sufficient, and that any further applications would have been futile. *See id.*

The Supreme Court recognized that generally, when a party fails to submit a re-application or request a variance, their claims are not ripe for judicial review. *See id.* However, the Court noted that the Mayhews spent over a year in negotiations with the Town, spent over $500,000 preparing and developing the application, compromised with the Town, altered their original proposal, and filed a modified application to the Town council. *See id.* The Court concluded that, "under the circumstances of this case, the Mayhews were not required to submit additional alternative proposals, after years of negotiations and $500,000 in expenditures, to ripen this complaint." *Id.* at 932.

We believe the same rationale is applicable here. The Kolbs submitted their original application for a subdivision plat on August 12, 1993. The application was denied based on excessive block lengths and failure to dedicate a right-of-way for the Grand Parkway. The Kolbs made changes to the application to comply with the block length requirement and resubmitted the application. However, on September 9, 1993, the application was denied solely because of the failure to comply with the City's plans for the Grand Parkway. The Kolbs then filed this suit, alleging that the City had "taken" or "damaged" their property.

At trial, several witnesses testified the sole reason the Kolbs' application was denied was because the proposed subdivision conflicted with the plans for the Grand Parkway. Carlos Zapata, a Senior Planner for the City, testified no variances had ever been granted for the approval of a subdivision plat wherein the Grand Parkway was proposed to intersect the property. Robert Litke, Director of

the City's Planning Department, testified the Kolbs' application would not gain approval unless there was a dedication of at least a hundred feet of right-of-way for the Grand Parkway. Litke stated the City requires this dedication of land as part of its Major Thoroughfare Plan. In addition, two consultants to the Grand Parkway Association testified the association protected the alignment of the Grand Parkway corridor so the costs of acquiring the right-of-way in the future would be decreased.[5] Based on this evidence, the trial court found the Kolbs would be required to dedicate or donate a right-of-way in order to obtain approval of their application for subdivision plat.

The evidence also showed that neither the planning and zoning commission nor the City had the authority to alter or amend the pathway of the Grand Parkway. Litke testified that the State Highway Department has exclusive jurisdiction over controlled access highways such as the Grand Parkway.

We conclude there was sufficient evidence the [sic] prove it would have been futile for the Kolbs to request a variance from, or seek alternative solutions with, the City. After the Kolbs' second application was denied, the City's position was clear – the Kolbs' application would

---

[5] Several Texas courts have recognized that governmental entities cannot act to gain an unfair advantage by imposing restrictions or prohibitions on the use of property in order to prevent private development from increasing the cost of planned and future acquisition of the property. *See State of Texas v. Biggar*, 873 S.W.2d 11, 13 (Tex.1994); *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978); *San Antonio River Authority v. Garrett Bros.*, 528 S.W.2d 266 (Tex.Civ.App. – San Antonio 1975, writ ref'd n.r.e.).

not be approved unless a right-of-way was dedicated to the City for the Grand Parkway. Moreover, the City did not have the power or authority to relocate or alter the Grand Parkway's proposed pathway. We therefore hold that, to require the Kolbs to seek further variances or to hold a public hearing in front of the City's planning and zoning commission, an entity that has absolutely no power in relation to the Grand Parkway, would have been pointless. As the Supreme Court said in *Mayhew*:

> Any other holding would require the Mayhews to expend their own time and resources pursuing, and the Town's time and resources considering, a development proposal that the Mayhews would never actually develop. Requiring such a wasteful expenditure of resources would violate the Supreme Court's admonition that a property owner is 'not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a final] determination.' [citation omitted]. The Town clearly was not going to approve the Mayhews' development proposal for 3600 units, making a subsequent application or variance request for 3,600 units a futile act.
>
> *Mayhew*, 964 S.W.2d at 932.

The City argues *Mayhew* is distinguishable because the Mayhews engaged in extensive discussions and negotiations with the Town of Sunnyvale for over a year. The City points out that the Kolbs only met with one City planner and never attempted to reach a compromise with the City. However, in *Mayhew*, the Town had control over the zoning ordinances that were at issue. Here, it was clearly not within the control of the City to change the

route of the Grand Parkway. Therefore, extensive discussions and negotiations that the City suggests were necessary to ripen the Kolbs' claims would have served no purpose.

We find this cause is ripe for judicial review. Accordingly, the trial court properly denied the City's motion to dismiss. The City's motion to dismiss is overruled.

COMMONALITY TO THE COMMUNITY

The City's second point of error states, "the trial court erred in its finding that there was a taking by inverse condemnation without just compensation because there was insufficient evidence to support a finding that seeking further administrative remedies would be futile." However, the City's actual argument under this point of error is that the injury appellees received was "common to the community" and, therefore, may not be considered in estimating damages.[6] The City also argues that the Kolbs cannot recover for a future taking.

Courts allow recovery under Article I, Section 17 only if the injury is not one suffered by the community in general. *See Felts v. Harris County*, 915 S.W.2d 482, 484 (Tex.1996). Community injuries include highway traffic noise, dust, traffic hazards, and circuitous routes; injuries such as these are not compensable. *See id.* On the other hand, constitutional damages are warranted for a taking if the government makes a physical appropriation, denies

---

[6] The City never raised this argument in the trial court.

access to property, or denies a permit for development. *See Westgate, Ltd. v. State*, 843 S.W. 2d 448, 453 (Tex. 1992).

The City argues that because the Grand Parkway is proposed to be approximately 170 miles in length, "the planned roadway will have a common or community effect upon the entire community within its planned right of way."[7] We disagree. Unlike other property owners who may eventually be affected by the visual impact, noise, traffic congestion, and other characteristics commonly associated with the close proximity of a major highway, the Kolbs have suffered a present and specific loss that is not common to all landowners. By its denial of the subdivision plat, the City has denied the Kolbs the free and unrestricted enjoyment of their property. Moreover, the record indicates the City will continue to deny the proposed subdivision plat unless and until the Kolbs agree to give the City a large portion of their property for possible use as a right-of-way for the Grand Parkway. In other words, the damages alleged by the Kolbs – the denial of a permit – were not shared by the community in general. Thus, the Kolbs' damages are different from those experienced by the community generally.

The City also alleges that, because the plans to construct the Grand Parkway intersecting the Kolbs' property are merely a proposal that may never come to fruition, the Kolbs cannot recover for a present taking. The City bases its argument on case law stating, "future plans which

---

[7] The City does not elaborate on this argument or explain what specific damages the community landowners will suffer in common.

might result in a future taking are merely 'future prospects' and, as such, cannot constitute a taking." *Hubler v. City of Corpus Christi*, 564 S.W.2d 816, 821 (Tex. Civ. App. – Corpus Christi 1978, writ ref'd n.r.e.). Further, "the announcement of a projected public improvement together with preparation of plans and maps showing the property in question within the limits of the project, without any interference with the landowner's use, does not constitute a present taking." *Id.* at 822. Here, however, the City has directly infringed upon the owner's current use of the property. *See Westgate*, 843 S.W.2d at 453 (recognizing that "publicly targeting a property for condemnation, resulting in economic damage to the owner, generally does not give rise to an inverse condemnation cause of action *unless there is some direct restriction on use of the property.*"). We find, therefore, that the Kolbs have suffered a real and current taking.

Accordingly, the City's second point of error is overruled.

COMPENSABLE DAMAGES

In its third point of error, the City argues the trial court erred in allowing the compensable damages issue to be submitted to the jury because there was insufficient evidence to support a finding of compensable damages at the hearing on the taking. Building on its argument under its second point of error, the City contends that, because the damage sustained by the Kolbs was common to the community, they were not entitled to any compensation.

First, we find the City has not properly preserved this argument for our review. Rule 274 of the Texas Rules of Civil Procedure provides:

> A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections.

TEX. R. CIV. P. 274. The purpose of Rule 274 is to afford trial courts the opportunity to correct errors in the charge by requiring that any objection made clearly designate the error and explain the grounds for complaint. *See Wilgus v. Bond*, 730 S.W.2d 670, 672 (Tex.1987). Therefore, when a particular instruction included in the trial court's charge to the jury is defective, the complaining party must make a timely and specific objection pointing out the matter complained of and the ground of the objection. If the objection does not fully comply with the requisites of Rule 274, the party waives the complaint. *See Kirkpatrick v. Memorial Hospital*, 862 S.W.2d 762, 769 (Tex. App. – Dallas 1993, writ denied). Even though an instruction may be erroneous, a party waives the error if he does not properly object. *See Castleberry v. Branscum*, 721 S.W.2d 270, 276 (Tex. 1986).

The City raised several objections at the charge conference. For instance, the City objected that the charge did not include one of its requested instructions. The City also objected to an instruction that was included in the charge. However, the City did not object to the charge on the basis that the Kolbs were not entitled to compensable damages. We find the City has therefore waived any error relating to the submission of the compensable damages question.

Further, even if the City had properly preserved error, the record demonstrates there was sufficient evidence to support the jury's compensable damages finding. As discussed above, the damage sustained by the Kolbs was not common to the community. Rather the damages were specific to Kolb's property. Thus, the Kolbs were entitled to compensation for the taking or damaging of the property. *See Westgate*, 843 S.W.2d at 453. Two witnesses – David Lewis and Albert Allen – testified the value of the Kolbs' property substantially decreased after the denial of the application for the plat. Although the City's expert, Jack Mann, testified the property value remained the same before and after the denial of the application, the jury was entitled to believe Lewis and Allen and determine the Kolbs were entitled to compensable damages.

In its post-submission brief, the City argues that, in order for the Kolbs to recover for damages, they must show the property has been rendered useless and has no value. In support of this argument, the City relies on the following statement in *Mayhew*

> Under substantive law, a regulatory taking occurs when governmental regulations deprive the owner of *all* economically viable use of the property or totally destroy the property's value.

Mayhew, 964 S.W.2d at 936 (citations omitted). Based on this statement, the City argues that, because Kolbs' experts testified the property still had some value after the denial of the application, there could have been no compensable taking.

Under both the United States and Texas Constitutions, however, a property owner must be compensated for *any*

taking. *See* U.S. Const. Amend. 5 (" . . . private property [shall not] be taken for public use, without just compensation."); Tex. Const. article I, section 17 (no "person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made."). Further, the Supreme Court recognized in *Mayhew* that "[a] compensable regulatory taking can also occur when governmental agencies impose restrictions that either (1) deny landowners of all economically viable use of their property, or (2) unreasonably interfere with landowners' rights to use and enjoy their property." *Mayhew*, 964 S.W.2d at 935. The Kolbs presented evidence to show that the value of their land was diminished by the City's interference with their right to use, enjoy, and develop the property. Accordingly, the City's third point of error is overruled.

On rehearing, the City argues that if the trial court's judgment is to be enforced, the City should "be awarded the 'right of way,' 'an easement,' or some other legal interest in the land." Otherwise, the City contends the land owners will be permitted a double recovery. We disagree.

The jury's award represents compensation for damage to the Kolbs' property, *i. e.*, the diminishment of the land's value caused by the City's restrictions on its use and development. The City denied Kolbs' developmental plat, in part, to decrease the costs of any future acquisition of a right-of-way.[8] The City has achieved its objective. So long

---

[8] John Ray Collins, Jr., a civil engineer and consultant for the Grand Parkway Association, testified as follows:

as the City continues to insist upon the dedication of a right-of-way for the Grand Parkway, and the Kolbs are

---

Q. And what criteria do you utilize in making the determination to make a recommendation that a particular development that's under review does or does not conflict with the Grand Parkway?

A. If it proposes the establishment – let me think about that a second. There are basically two kinds of plats that come through here for review from the City of Houston Planning Department. One is major thoroughfare plats. The second is – are subdivision plats. . . .

* * *

So what I was going to say was the first kind, the subdivision plats that would put housing structures in the way of the Parkway are the ones that I strongly recommend against because if those things were there, then the Highway Department in its acquisition through eminent domain would have to buy out houses and people would be disrupted and have to move.

Q. And that would cost them more money?

A. It would cost them more money, certainly would.

Q. And may result in a substantial increase in their costs of acquiring property in order to be able to construct the public project?

A. Absolutely correct.

Q. And so from your perspective as someone who is trying to render advice and utilize your expertise in the planning and development of roadways for the Grand Parkway Association, you don't want to see that kind of thing happen?

A. That's correct.

Q. And so whenever you view that that could be – that could occur, you make it known to the City of

unwilling to grant it, the land will remain undeveloped. Thus, the cost of any future acquisition of the corridor has been minimized, and the judgment represents, in an abstract sense, the cost of suspending development.

The City's motion for rehearing is denied and the judgment of the trial court is affirmed.

Houston or whatever governmental authority has responsibility for approving developmental plats, you make it known that the Grand Parkway Association has objections or takes exception to that approval of that development?

A. That's exactly right.

Q. And the reason for that is; one, you don't want it to conflict with the proposed corridor; and two, you don't want to increase the cost for the State of Texas in the acquisition of those properties?

A. That is correct. And there is a third too, and it's the disruption of the lives of the people involved whose structures are being taken.

APPENDIX B

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

December 02, 1999

Ms. Andrea Chan
Assistant City Attorney
P. O. Box 1562
Houston, TX 77251

Mr. W. Allyn Hoaglund
Law Offices of W. Allyn Hoaglund
909 Fannin, Suite 3030
Houston, TX 77010

RE: Case Number 99-0156
Court of Appeals Number: 14-97-00133-CV
Trial Court Number: 637,756

Style: CITY OF HOUSTON

v.

JOHN E. KOLB, JAMES W. MCCARTNEY, WILLIAM M. LINDEN, RAYMOND S. MAISLIN, O. SCOTT ROGERS, BETTY PULASKI WESTON, B. RED, INC., RACHEL S. KOLB, DAVE KAMINSKY, ROBERT I. KAMINSKY, STEPHEN KAMINSKY, CHARLES D. KOLB, JAMES R. SUD, trustees

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above-referenced case. (Justices O'Neill and Gonzales not sitting.)

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca E. Morin, Deputy

APPENDIX C

No. 637,756

JOHN E. KOLB, JAMES W. MCCARTNEY, WILLIAM M. LINDEN RAYMOND S. MAISLIN, O. SCOTT ROGERS, BETTY PULASKI WESTON, B RED INC., RACHEL S. KOLB, DAVE KAMINSKY, ROBERT I. KAMINSKY, STEPHEN KAMINSKY, CHARLES D. KOLB, JAMES P. SUD, TRUSTEES OF THE JUDITH SUD AND BETTY P. SUD TRUST, AND J. E. ROUSSELL,	§	IN THE COUNTY CIVIL COURT AT LAW NO. FOUR
Plaintiffs,	§	HARRIS COUNTY, TEXAS
VS.	§	
THE CITY OF HOUSTON,	§	
Defendants.	§	

JUDGMENT

BE IT REMEMBERED that on this 17th day of October, 1996, came on to be heard the above-entitled and numbered cause wherein JOHN E. KOLB, JAMES W. McCARTNEY, WILLIAM M. LINDEN, RAYMOND S. MAISLIN, O. SCOTT ROGERS, BETTY PULASKI WESTON, B RED, INC., RACHEL S. KOLB, DAVE KAMINSKY, ROBERT I. KAMINSKY, STEPHEN KAMINSKY, CHARLES D. KOLB, JAMES P. SUD, TRUSTEES OF THE JUDITH SUD AND BETTY P. SUD TRUST, and J. E. ROUSSELL, are Plaintiffs ("Kolb") and

THE CITY OF HOUSTON is Defendant, and the parties appeared by and through their respective attorneys of record and announced ready for trial, and prior to the selection of the jury, the Court conducted an evidentiary hearing and the parties presented evidence on the issue of whether the Kolb property had been inversely condemned by the City of Houston, and the Court after considering all the evidence presented by the parties is of the opinion that the denial by the City of Houston of Plaintiffs' application for subdivision plat for the Park-Place Northwest Subdivision on September 9, 1993 was an unreasonable interference with the right to use and enjoy the property of Plaintiffs, which was done in part to decrease the costs of acquisition of property for a public use and constituted a taking or damaging under Article I, Section 17 of the Texas Constitution; whereupon a jury comprised of six (6) good and lawful jurors was duly accepted, empaneled and sworn to try this cause;

And after hearing the evidence, the arguments of counsel and the instructions of the Court in its charge, a question was submitted to the Jury on October 25, 1996, and after their deliberations, the Jury returned in open court on October 25, 1996, and advised the Court that they had reached a verdict in the sum of $1,305,819.00.

After the verdict of the Jury was received in open court and the presiding Juror indicated to the Court that such verdict was the unanimous verdict of the Jury, the Court accepted the Jury's verdict and ordered that same be filed herein as the verdict of the Jury in this cause, whereupon the Jury was discharged; and the Court is of the opinion that judgment should be entered on the Jury's verdict, and it is hereby;

ORDERED that Plaintiffs, JOHN E. KOLB, JAMES W. McCARTNEY, WILLIAM M. LINDEN, RAYMOND S. MAISLIN, O. SCOTT ROGERS, BETTY PULASKI WESTON, B RED, INC., RACHEL S. KOLB, DAVE KAMINSKY, ROBERT I. KAMINSKY, STEPHEN KAMINSKY, CHARLES D. KOLB, JAMES P. SUD, TRUSTEES OF THE JUDITH SUD AND BETTY P. SUD TRUST, and J. E. ROUSSELL, recover from Defendant, THE CITY OF HOUSTON, the sum of One Million Three Hundred Five Thousand Eight Hundred Nineteen and No/100 Dollars ($1,305,819.00), together with prejudgment interest on such sum at the rate of ten percent (10%) simple interest from September 9, 1993 until the date of the judgment herein, which interest amounts to Four Hundred Fifty-Five Thousand Eighty-One and 20/100 Dollars ($455,081.20), together with reasonable and necessary attorney's fees pursuant to Section 37.009, Tx. Civ. Prac. Rem. C. in the sum of Three Hundred Ninety-One Thousand Three Hundred Eleven and 11/100 Dollars ($391,311.11) through the date of judgment, for a recovery by Plaintiffs from THE CITY OF HOUSTON of Two Million One Hundred Fifty-Two Thousand Two Hundred Eleven and 31/100 Dollars ($2,152,211.31), together with interest thereon at the rate of ten percent (10%) per annum from the date of this judgment until paid by Defendant, THE CITY OF HOUSTON; and it is further,

ORDERED that in the event this case is appealed to the Court of Appeals, Plaintiffs shall be entitled to recover an additional Twenty Thousand and No/100 Dollars ($20,000.00) as reasonable and necessary attorney's fees; if an application for writ of error is submitted to the Supreme Court of Texas, Plaintiffs shall be entitled to an

additional Ten Thousand and No/100 Dollars ($10.000.00) as reasonable and necessary attorney's fees; if writ of error is granted by the Supreme Court of Texas, Plaintiffs shall be entitled to an additional Five Thousand and No/100 Dollars ($5,000.00) as reasonable and necessary attorney's fees; and if an appeal is taken to the United States Supreme Court, Plaintiffs shall be entitled to an additional Twenty Thousand and No/100 Dollars ($20,000.00) as reasonable and necessary attorney's fees.

ORDERED, that all costs of Court be taxed against Defendant, THE CITY OF HOUSTON, for which let execution issue if not timely paid, together with interest thereon at the rate of ten percent (10%) per annum from the date of this judgment.

SIGNED this the 28th day of October, 1996.

/s/ Cynthia Crowe
JUDGE PRESIDING

APPROVED AS TO FORM AND SUBSTANCE:

LAW OFFICES OF W. ALLYN HOAGLUND
3030 Two Houston Center
Houston, Texas 77010
(713) 655-7744
FAX (713) 655-8245

By: /s/ W. Allyn Hoaglund
W. Allyn Hoaglund
State Bar No. 09736500

ATTORNEY FOR PLAINTIFFS

APPENDIX D

NO. 637,756

JOHN E. KOLB ET AL.	*	IN THE COUNTY CIVIL COURT
VS.	*	
THE CITY OF HOUSTON	*	AT LAW NUMBER FOUR (4)
	*	HARRIS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Cynthia Crowe, Judge of County Civil Court at Law No. 4, pursuant to Tex. R. Civ. P. 297, files Findings of Fact and Conclusions of Law on the issues that were tried to the Court and which form the basis of the judgment signed by the Court on October 28, 1996. The remaining issues that form the basis of the judgment were tried to a jury and are not addressed herein.

I. Findings of Fact

1. The Grand Parkway, which has been designated as State Highway 99, is a proposed six (6) lane, non-toll highway that will loop around the City of Houston, outside of Beltway 8, and be approximately 170 miles in length.

2. The Grand Parkway (State Highway 99) is a controlled access highway of the State of Texas.

3. The Grand Parkway (State Highway 99) is a public use project.

4. The Grand Parkway Association is a non-profit Texas transportation corporation which was created to act on behalf of the State Highway and Public Transportation Commission of the State of Texas.

5. The State of Texas is involved in the operation of the Grand Parkway Association and appoints its members.

6. The Grand Parkway Association and the City of Houston coordinate efforts to ensure that the goals of the State of Texas with respect to the Grand Parkway (State Highway 99) are accommodated.

7. The authority to locate, alter, or relocate the alignment of the right-of-way for the Grand Parkway (State Highway 99) is within the exclusive authority of the State of Texas, by and through the State Highway and Public Transportation Commission.

8. Plaintiffs are the legal owners of approximately 314 acres of land in Harris County, Texas.

9. The Plaintiffs' property is located within the extra-territorial jurisdiction of the City of Houston.

10. The right-of-way for the Grand Parkway (State Highway 99) is proposed to cross or traverse the 314 acres of land owned by Plaintiffs.

11. The precise location of the proposed Grand Parkway (State Highway 99) across Plaintiffs' property has not been determined.

12. The City of Houston approved the 1992 Major Thoroughfare and Freeway Plan, which included the proposed alignment of the Grand Parkway (State Highway 99) across the Plaintiffs' property.

13. The alignment screen of the proposed Grand Parkway (State Highway 99) as reflected on the 1992 Major Thoroughfare and Freeway Plan covers virtually the entire property of Plaintiffs.

14. The proposed Grand Parkway (State Highway 99) is not a major thoroughfare of the City of Houston.

15. No major thoroughfares of the City of Houston are proposed to cross Plaintiffs' property.

16. The only highway proposed to cross Plaintiffs' property on the 1992 Major Thoroughfare and Freeway Plan of the City of Houston is the proposed Grand Parkway (State Highway 99), which is a controlled access highway of the State of Texas.

17. The City of Houston has no authority or jurisdiction to alter, relocate, locate or designate the right-of-way for the proposed Grand Parkway (State Highway 99).

18. The City of Houston has the exclusive authority to approve or disapprove of subdivision plats within the extraterritorial jurisdiction of the City of Houston in accordance with Chapter 42 of the Houston Code of Ordinances.

19. Access to and from the proposed Grand Parkway (State Highway 99) for vehicular traffic will be denied within the boundaries of the property owned by Plaintiffs.

20. It would cost more than $2,000,000.00 to construct an overpass or underpass in order to be able to cross the proposed Grand Parkway (State Highway 99) within the boundaries of Plaintiffs' property.

21. Plaintiffs planned to develop their property as a subdivision of single-family residential houses called ParkPlace Northwest Subdivision.

22. Plaintiffs, with the advise [sic] and counsel of engineer Charles Kalkomey, who was experienced with residential subdivision development, prepared an application for subdivision plat for the purpose of the actual development of a residential subdivision that would be offered for sale by the Plaintiffs.

23. In order for property to be subdivided within the extraterritorial jurisdiction of the City of Houston, an application for subdivision plat must be submitted to and approved by the City of Houston.

24. The City of Houston acts through its Planning and Zoning Commission in connection with the approval or disapproval of subdivision plats.

25. The Plaintiffs could not subdivide their property without the approval of the City of Houston's Planning and Zoning Commission.

26. On July 6, 1993, Plaintiffs' original application for subdivision plat for ParkPlace Northwest Subdivision was submitted to the City of Houston's Planning and Zoning Commission for approval.

27. Plaintiffs' application for subdivision plat was a meaningful one, submitted to the City of Houston in good faith, for the purpose of obtaining approval for the development of Plaintiffs' property as a residential subdivision.

28. The Grand Parkway Association and the City of Houston have an arrangement whereby any subdivision or development plat that is in the vicinity of the proposed alignment for the Grand Parkway (State Highway 99), which is submitted to the City of Houston's Planning and Zoning Commission, is forwarded to the Grand Parkway Association for its review and comment.

29. As part of its policies and procedures, the City of Houston's Planning and Zoning Commission sought the advice of the Grand Parkway Association with respect to Plaintiffs' application for subdivision plat for the ParkPlace Northwest Subdivision.

30. By letter dated August 12, 1993, the Grand Parkway Association advised the City of Houston that it took exception to the subdivision plat submitted by Plaintiffs because it would prohibit the use of the Grand Parkway alignment corridor.

31. On August 12, 1993, the City of Houston, acting by and through its Planning and Zoning Commission, denied Plaintiffs' original application for the ParkPlace Northwest Subdivision stating that it did not conform to the approved 1992 Major Thoroughfare and Freeway Plan of the City of Houston and because certain block lengths shown on the plat were excessive.

32. After disapproval of their original application for subdivision plat by the City of Houston, Plaintiffs revised their subdivision plat to reduce the number of lots from 213 to 195 and to eliminate any excessive block lengths that were contrary to the provisions of Chapter 42 of the Houston Code of Ordinances.

33. Plaintiffs' revised subdivision plat did not show the location of the proposed Grand Parkway (State Highway 99) across Plaintiffs' property.

34. Plaintiffs resubmitted their application for subdivision plat to the City of Houston's Planning and Zoning Commission for consideration.

35. On September 9, 1993, the City of Houston, acting by and through its Planning and Zoning Commission, again denied the application for subdivision plat submitted by Plaintiffs for their ParkPlace Northwest Subdivision on the stated basis that it did not

conform to the 1992 Major Thoroughfare and Freeway Plan of the City of Houston.

36. The denial by the City of Houston of Plaintiffs' application for subdivision plat on September 9, 1993, was in order to protect the proposed corridor of the Grand Parkway (State Highway 99) and to decrease the future costs associated with the acquisition of the right-of-way of the proposed Grand Parkway by the State of Texas when it exercises its powers of eminent domain in the future.

37. In order to obtain approval of the application for subdivision plat submitted by Plaintiffs, Plaintiffs were told that they would be required to dedicate or donate land for a right-of-way for the proposed Grand Parkway.

38. The City of Houston's denial of Plaintiffs' second application for subdivision plat was against the economic interests of Plaintiffs and was for its own advantage and that of the State of Texas, another governmental entity.

39. Plaintiffs did not request a variance from the Planning and Zoning Commission of the City of Houston or City Council in order to petition for the relocation of the proposed Grand Parkway (State Highway 99) off their property.

40. Neither the Houston City Council nor the Houston Planning and Zoning Commission had the authority to alter or relocate the alignment of the proposed Grand Parkway (State Highway 99) through Plaintiffs' property.

41. A request for a variance would not be applicable to any effort by Plaintiffs to have the proposed Grand Parkway (State Highway 99) relocated off their property because neither the City of Houston's Planning

and Zoning Commission nor City Council would have the authority to do so.

42. It would have been futile for Plaintiffs to seek a variance to alter or relocate the proposed Grand Parkway (State Highway 99) off their property from the City of Houston's Planning and Zoning Commission or City Council.

43. The City of Houston required the Plaintiffs to dedicate or donate land for the proposed Grand Parkway (State Highway 99) as a condition for approval of Plaintiffs' application for subdivision plat and therefore any further efforts to obtain permission to subdivide the property of Plaintiffs would have been futile.

44. The acquisition costs for a right-of-way for the Grand Parkway would be increased if Plaintiffs' application for subdivision plat was approved.

45. Plaintiffs were denied permission to subdivide their property in order to reduce the cost of a future public project.

46. The action of the City of Houston in denying the application for subdivision plat for the ParkPlace Northwest Subdivision on September 9, 1993, was an unreasonable interference with the Plaintiffs' right to use and enjoy their property.

47. Plaintiffs' reasonable and necessary attorney's fees through trial were one-third of the amount recovered by Plaintiffs, which equals $587,133.40.

48. If the City of Houston unsuccessfully appeals this case to the Court of Appeals, Plaintiffs' reasonable and necessary attorney's fees will be an additional $20,000.00.

49. If writ of error is submitted to the Supreme Court of Texas, Plaintiff's reasonable and necessary attorney's fees will be an additional $10,000.00.

50. If writ of error is granted by the Supreme Court of Texas, Plaintiffs' reasonable and necessary attorney's fees will be an additional $5,000.00.

51. If an appeal is taken to the United States Supreme Court, Plaintiffs' reasonable and necessary attorney's fees will be an additional $20,000.00.

52. Plaintiffs' reasonable and necessary attorney's fees for the liability issues only in this cause are $391,311.11 and thus, that amount is an equitable and just amount of attorney's fees to award Plaintiffs through trial.

53. $20,000.00 is an equitable and just amount of additional attorney's fees to award Plaintiffs if the City of Houston unsuccessfully appeals this case to the Court of Appeals.

54. $10,000.00 is an equitable and just amount of attorney's fees to award Plaintiffs if an application for writ of error is submitted to the Supreme Court of Texas.

55. $5,000.00 is an equitable and just amount of additional attorney's fees to award Plaintiffs if the Supreme Court of Texas grants writ of error.

56. $20,000.00 is an equitable and just amount of additional attorney's fees to award Plaintiffs if an appeal is taken to the United States Supreme Court.

57. Plaintiffs are entitled to recover $405,581.20 as prejudgment interest.

II. CONCLUSIONS OF LAW

1. The Court has jurisdiction of this case. Tex. Prop. Code Ann. § 21.001 (Vernon 1984); Tex. Govt. Code Ann. § 25.1032 (Vernon Supp. 1996); and Tex. Civ. Prac. & Rem. Code Ann. § 37.003(a) (Vernon 1986).

2. In order for property to be subdivided within the extraterritorial jurisdiction of the City of Houston, an application for subdivision or development plat must be submitted to and approved by the City of Houston through its Planning and Zoning Commission. Chapter 42 of the Houston Code of Ordinances.

3. No property within the extraterritorial jurisdiction of the City of Houston may be subdivided unless the City of Houston approves the subdivision plat. Chapter 42 of the Houston Code of Ordinances.

4. The exclusive power for a controlled-access highway within the State of Texas, including the City of Houston and its extraterritorial jurisdiction, is conferred to the State of Texas by and through the State Highway Department, now known as the Texas Department of Transportation. Tex. Rev. Civ. Stat. Ann. art. 6674w, 6674w-1 (Vernon Supp. 1996) and 6674w-5 (Vernon 1977).

5. Neither the City of Houston's Planning and Zoning Commission nor City Council have any authority to grant a variance to amend or relocate the Grand Parkway (State Highway 99). *See* Tex. Rev. Civ. Stat. Ann. art. 6674w, 6674w-1 (Vernon Supp. 1996) and 6674w-5 (Vernon 1977).

6. The action of the City of Houston in denying Plaintiffs' second application for subdivision plat for the ParkPlace Northwest Subdivision on September 9, 1993, constituted an unreasonable interference with Plaintiffs' right to use and enjoy their property. *See*

Westgate, Ltd. v. State, 843 S.W.2d 448, 452 (Tex. 1992).

7. The denial of Plaintiffs' application for subdivision plat for the ParkPlace Northwest Subdivision on September 9, 1993, was to decrease the future costs of a public project. *See San Antonio River Authority v. Garrett Brothers*, 528 S.W.2d 266, 274 (Tex. Civ. App. - San Antonio 1975, writ refd n.r.e.).

8. The actions of the City of Houston in denying Plaintiffs' application for subdivision plat for the ParkPlace Northwest Subdivision on September 9, 1993, was against the economic interests of Plaintiffs and for the advantage of the City of Houston and other governmental authorities. *See City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978); *State of Texas v. Biggar*, 873 S.W.2d 11,13, (Tex. 1994).

9. The City of Houston's denial of Plaintiffs' application for subdivision plat for the proposed ParkPlace Northwest Subdivision on September 9, 1993, and the refusal of the City of Houston to permit Plaintiffs to subdivide their property constitutes a compensable taking or damaging of Plaintiffs' property within the meaning of Tex. Const. art 1 § 17 (Vernon 1984), for a public purpose.

10. The City of Houston has no legal authority to require Plaintiffs to donate or dedicate a portion of their property for a controlled-access highway of the State of Texas, such as the Grand Parkway (State Highway 99). *See* Chapter 42 of the Houston Code of Ordinances; Tex. Const. art. 1 § 17 (Vernon 1984).

11. The City of Houston's refusal to permit the subdivision of Plaintiffs' 314 acre property unless a right-of-way for the proposed Grand Parkway is dedicated imposes a servitude on Plaintiffs' property and constitutes a taking or damaging of Plaintiffs' property

within the meaning of Article 1, Section 17 of the Texas Constitution. *See City of Austin v. Teague*, 570 S.W.2d 389, 394 (Tex. 1978).

12. The controversy between Plaintiffs and the City of Houston is ripe for judicial determination.

13. Plaintiffs are "persons" as defined in Tex. Civ. Prac. & Rem. Code Ann. § 37.001 (Vernon 1986).

14. Plaintiffs' rights were affected by the City of Houston's interpretation and enforcement of Chapter 42 of the Houston Code of Ordinances, and Plaintiffs were entitled to obtain a declaration of their rights and status thereunder. Tex. Civ. Prac. & Rem. Code Ann. § 37.004(a) (Vernon 1986).

15. Only the Plaintiffs and the City of Houston have or claim any interest that would be affected by a declaration that the City of Houston wrongfully interpreted and enforced Chapter 42 of the Houston Code or Ordinance. Tex. Civ. Prac. & Rem. Code Ann. § 37.006 (a) (Vernon 1986).

16. The City of Houston wrongfully interpreted and enforced Chapter 42 of the Houston Code of Ordinances relating to subdivision plats, by refusing to permit the subdivision of Plaintiffs' 314-acre property unless a right-of-way for the proposed Grand Parkway (State Highway 99) is dedicated by Plaintiffs. *See* Chapter 42 of the Houston Code of Ordinances; Tex. Const. art. 1 § 17 (Vernon 1984).

17. Plaintiffs are entitled to recover their costs and any reasonable and necessary attorney's fees that are equitable and just. Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (Vernon 1986).

18. Plaintiffs are entitled to recover prejudgment interest at the rate of ten percent (10%) simple interest per annum from the date of injury, September 9,

1993, until judgment. Tex. Rev. Civ. Stat. Ann. art 5069-1.05, Sec. 7. (Vernon Supp. 1986).

19. Plaintiffs are entitled to recover post-judgment interest at the rate of 10% per annum from the date of judgment until paid. Tex. Rev. Civ. Stat. Ann. art 5069-1.05, Sec. 2 (Vernon Supp. 1986).

Filed this December 9, 1996.

/s/ Cynthia Crowe
Judge Presiding

Certificate of Service

I hereby certify that on this day I placed in the United States mails, postage prepaid, copies of the foregoing Findings of Fact and Conclusions of Law, addressed to:

Robert L. Cambrice
Senior Asst. City Attorney
P.O. Box 1562
Houston, Texas 77521

and

W. Allyn Hoaglund
3030 Two Houston Center
909 Fannin
Houston, Texas 77010

Signed December 9, 1996

/s/ Cynthia Crowe
Judge Presiding

APPENDIX E

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

January 20, 2000

Ms. Andrea Chan
Assistant City Attorney
P. O. Box 1562
Houston, TX 77251

Mr. W. Allyn Hoaglund
Law Offices of W. Allyn Hoaglund
909 Fannin, Suite 3030
Houston, TX 77010

RE: Case Number: 99-0156
Court of Appeals Number: 14-97-00133-CV
Trial Court Number: 637,756

Style: CITY OF HOUSTON

v.

JOHN E. KOLB, JAMES W. MCCARTNEY, WILLIAM M. LINDEN, RAYMOND S. MAISLIN, O. SCOTT ROGERS, BETTY PULASKI WESTON, B. RED, INC., RACHEL S. KOLB, DAVE KAMINSKY, ROBERT I. KAMINSKY, STEPHEN KAMINSKY, CHARLES D. KOLB, JAMES R. SUD, trustees

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above styled petition for review.

Justices O'Neill and Gonzales not sitting.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca E. Morin, Deputy

APPENDIX F

Cause No. 637,756

JOHN E. KOLB, ET AL	§	IN THE COUNTY
VS.	§	CIVIL COURT
	§	
THE CITY OF HOUSTON	§	AT LAW NO. FOUR (4)
	§	HARRIS COUNTY, TEXAS

DEFENDANT CITY OF HOUSTON'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

The CITY OF HOUSTON, a municipal corporation, and a Home Rule Municipality, Defendant, files this its Motion to Dismiss for Lack of Subject Matter Jurisdiction in the above styled and numbered cause and shows the Court the following:

* * *

The United States Supreme Court has referred to a regulation that "goes too far" as a taking. *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186, 105 S. Ct. 3108, 3116, 87 L.Ed.2d 126 (1985). The Supreme Court, however, has also made it clear that takings claims are not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. *Town of Sunnyvale v. Mayhew,* 905 S.W.2d 234, 245 (Tex. App. – Dallas 1994, writ requested); citing *Williamson,* 473 U.S. at 186, 105 S.Ct. at 3116.

In order for a plaintiff to assert that he has a claim of inverse condemnation that is ripe for adjudication, he must at the least be able to show that he has (1) made at least one *meaningful* application for development which has been rejected by the government entity; and (2) requested a variance which has also been denied by the government entity. *Sunnyvale,* 905 S.W.2d at 244. (Emphasis added). The ripeness doctrine requires the plaintiff to apply for a variance to establish to what extent the regulatory body will permit development. *Sunnyvale* at 244. Only after the application and denial of a variance can a court determine whether the regulation has gone "too far". *Id.*

* * *

CONCLUSION AND PRAYER

It is clear from the pleadings and the facts of this case that Plaintiffs' claims are not ripe for adjudication and, therefore, this Court should dismiss this case for lack of subject matter jurisdiction.

APPENDIX G

NO. 14-97-00133-CV

IN THE COURT OF APPEALS FOR THE FOURTEENTH COURT OF APPEALS DISTRICT OF TEXAS HOUSTON, TEXAS

CITY OF HOUSTON,

Appellant,

VS.

JOHN E. KOLB, ET AL.

Appellee.

BRIEF OF APPELLANT

---

* * *

POINTS OF ERROR

Point of Error Number One

The trial court erred in its denying *Defendant City of Houston's Motion to Dismiss for Lack of Subject Matter Jurisdiction* because there was insufficient evidence to support a finding that the court has subject matter jurisdiction because without appellees' exhausting their administrative remedies the lawsuit was not ripe for adjudication in a trial court.

* * *

Appellant asserted that appellees' claims were premature and, therefore, were not properly before the court. Ripeness is a question of law. *Herrington v. County of Sonoma*, 857 f.2d 567, 568 (9th Cir. 1988), cert. denied, 489 U.S. 1090, 109 S.Ct. 1557. The ripeness doctrine is an essential prerequisite to bringing a claim of inverse condemnation. *City of El Paso v. Madero Development*, 803 S.W.2d 396, 400 (Tex. App. – El Paso 1991, writ denied, cert. denied, 502 U.S. 1073, 112 S.Ct. 970, 117 L.Ed. 135 (1992). Until the requirement of ripeness has been met any attempt to place a claim based on regulatory taking places nothing before the court over which it has power to adjudicate. *Id.* A controversy in administrative law is ripe for courts when administrative remedies have been exhausted. *Id.* This is to protect agencies, *inter alia*, from judicial interference until the administrative decision has been formalized and its effects felt in a concrete way. Id. 398-399.

"The United States Supreme [Court] has referred to a regulation that 'goes to [*sic*] far' as a taking. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 105 S.Ct. 3108, 3116, 87 L.Ed. 2d 126 (1985); *Agins v. City of Tiburon*, 477 U.S. 255, 260, 100 S.Ct. 2138, 2141, 62 L.Ed. 106 (1980). However, that Court made it clear that takings claims are not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. See *Williamson*, 473 U.S. at 186, 105 S.Ct. at 3116 . . . " *Town of Sunnyvale v. Mayhew*, 905 S.W.2d 234, 235 (Tex. App. Dallas – 1994, writ requested).

Under *Williamson* to claim for inverse condemnation the claimant must make at least one meaningful application for development which has been rejected by the governmental entity. . . . Only after the application and denial of a variance (which could mean other meaningful available administrative remedies) can a court determine whether the regulation has gone "too far". *Town of Sunnyvale v. Mayhew,* supra, at 234. See also *8 Nichols on Eminent Domain Chapter 14E, Section 14.03(5).*

In the case at bar appellees made a nominal plat application for development which was not prepared by an engineer. It was denied. A resubmission was made requesting a variance on only one of the reasons which were cited for the previous denial. After the second denial on the same point appellees abandoned the project, discontinued any efforts to gain an administrative remedy and filed this lawsuit on the basis that further applications would be futile.

Under the authorities cited appellant asserts that no good faith or legally sufficient effort was made to comply with or obtain a final administrative ruling prior to filing the lawsuit. Hence, the cause is not ripe for adjudication in a trial court.

* * *

APPENDIX H

NO. 99-0156

IN THE
SUPREME COURT OF TEXAS

CITY OF HOUSTON,

Petitioner,

v.

JOHN E. KOLB, JAMES W. MCCARTNEY, WILLLAM M. LINDEN, RAYMOND S. MAISLIN, O. SCOTT ROGERS, BETTY PULASKI WESTON, B. RED, INC., RACHEL S. KOLB, DAVE KAMINSKY, ROBERT I. KAMINSKY, STEPHEN KAMINSKY, CHARLES D. KOLB, JAMES R. SUD, TRUSTEES OF THE JUDITH SUD & BETTY P. SUD TRUST, and J.E. ROUSSEL,

Respondents.

Petition for Review of Appeal 14-97-133CV in the Court of Appeals for the Fourteenth District, from Cause No. 637,756 in the County Court at Law Four, Harris County

---

PETITION FOR REVIEW of the CITY OF HOUSTON

---

* * *

ISSUES PRESENTED

Issue 1: Was plaintiffs' case ripe for adjudication?

* * *

1. The Court of Appeals' Erroneous Decision Raises Questions about the Basic Jurisdictional Principle of Ripeness.

This Court should grant the City's Petition to address the incorrect application of the ripeness doctrine by the court of appeals. Ripeness is a fundamental principle of jurisdiction and Texas courts do not have subject matter jurisdiction to issue advisory opinions. *See Public Util. Comm'n v. Houston Lighting & Power Co.* 748 S.W.2d 439,442 (Tex. 1987) (a court has no jurisdiction to render advisory opinion on controversy not yet ripe); TEX. CONST. art. II, § 1. The ripeness doctrine also serves the prudential goal of conserving "judicial time and resources for real and current controversies, rather than abstract, hypothetical, or remote disputes." *Mayhew*, 964 S.W.2d at 928, *citing Browning-Ferris, Inc. v. Brazoria County*, 742 S.W.2d 43, 49 (Tex. App. – Austin 1987, no writ).

The ripeness doctrine has particular importance in the context of regulatory takings. The Supreme Court of the United States has explained, "[a] court cannot determine whether a regulation has gone too far unless it [actually] knows how far the regulation goes." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). This Court reinforced the importance of the ripeness doctrine in *Mayhew*, 964 S.W.2d 922. Addressing ripeness, this Court held that "for a regulatory takings claim to be ripe, there must be a final decision regarding the application of the regulations to the property at issue." *Mayhew*, 964 S.W.2d at 929 (citations omitted). In *Mayhew*, this Court specified criteria to determine whether a "final decision" had been made – "a 'final decision' usually requires both a rejected development

plan and the denial of a variance from the controlling regulations." *Mayhew*, 964 S.W.2d at 929, *citing Williamson Country Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 187-88 (1985).

* * *

(2)

No. 99-1690

Supreme Court, U.S.
FILED
MAY 19 2000
CLERK

In The

Supreme Court of the United States

CITY OF HOUSTON,

Petitioner,

v.

JOHN E. KOLB, JAMES W. McCARTNEY, WILLIAM M. LINDEN, RAYMOND S. MAISLIN, O. SCOTT ROGERS, BETTY PULASKI WESTON, B. RED, INC., RACHEL S. KOLB, DAVE KAMINSKY, ROBERT I. KAMINSKY, STEPHEN KAMINSKY, CHARLES D. KOLB, JAMES R. SUD, TRUSTEES OF THE JUDITH SUD & BETTY P. SUD TRUST, AND J. E. ROUSSEL,

Respondents.

On Petition For A Writ of Certiorari To The Court Of Appeals For The Fourteenth Supreme Judicial District Of Texas

RESPONDENTS' BRIEF IN OPPOSITION

W. ALLYN HOAGLUND
Counsel of Record
909 Fannin, Suite 3030
Houston, Texas 77010-1029
(713) 655-7744
(713) 655-8245 – Fax

Attorney for Respondents John E. Kolb, James W. McCartney, William M. Linden, Raymond S. Maislin, O. Scott Rogers, Betty Pulaski Weston, B. Red, Inc., Rachel S. Kolb, Dave Kaminsky, Robert I. Kaminsky, Stephen Kaminsky, Charles D. Kolb, James R. Sud, Trustees of the Judith Sud & Betty P. Sud Trust, and J. E. Roussel

CUCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does this Court have jurisdiction or should it exercise discretionary certiorari authority to review a state court case that does not involve any claim under the federal constitution or other federal law and in which no federal question was timely or properly raised at any stage of the state court proceedings?

2. Should this Court review a final decision of the Texas courts determining the case to be "ripe" when only state constitutional claims are present?

CORPORATE DISCLOSURE STATEMENT

Respondent B. Red, Inc. is a privately held corporation and no publicly held company owns any of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
PETITIONER'S MISSTATEMENTS OF FACT OR LAW	2
STATEMENT	3
REASONS FOR DENYING THE PETITION	7
A. No Jurisdiction	7
B. No Compelling Reason Exists to Grant The Petition	9
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978) . . 7, 10

Griggs v. Allegheny County, 369 U.S. 84, 82 S. Ct. 531 (1962) 10

Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998) *cert. denied* 119 S. Ct. 2018 (1999) 2, 3, 8, 9, 11

Michigan v. Long, 463 U.S. 1032 (1983) 8, 9

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) 8

Miller v. City of Beaver Falls, 368 PA. 189, 82 A. 2d 34 (1951) 10

Morris Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A. 2d 232 (1963) 10

San Antonio River Authority v. Garrett Bros., 528 S.W.2d 266 (Tex. Civ. App. – San Antonio 1975, writ ref'd n.r.e.) 7, 10

State of Texas v. Biggar, 873 S.W.2d 11 (Tex. 1994) . . 7, 11

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 8

TEXAS CONSTITUTION

TEX. CONST. ART. I, § 17 . . . . . 1, 2, 7, 8, 9, 11

TEX. CONST. ART. II § 1 9

STATUTES

28 U.S.C. § 1257(a) 1

TEX REV. CIV. STAT. ART. 6674w & 6674w-15 13

TABLE OF AUTHORITIES – CONTINUED

PAGE

OTHER

U.S. S. Ct. Rule 14(g)(i).....1, 9

JURISDICTION

This Court does not have jurisdiction of this case pursuant to 28 U.S.C. § 1257(a). Petitioner has not stated when a federal question was raised or the manner in which it was raised, as required by Rule 14(g)(i) of the Rules of the Supreme Court of the United States. The claims pursued at the trial of this case by Respondents[1] were based on the Texas Constitution.[2] Since no federal question was raised in the state court proceedings, this Court should deny the Petition for a Writ of Certiorari of the City of Houston.

CONSTITUTIONAL PROVISIONS INVOLVED

The only constitutional provision involved in this case is Article I, Section 17 of the Texas Constitution. Contrary to the assertions of Petitioner, no provision of the United States Constitution is involved. A review of the judgment of the trial court,[3] the findings of fact and conclusions of law of the trial court,[4] and the decision of

---

[1] Respondents may also be referred to herein as "Kolb." Petitioner may also be referred to as the "City."

[2] TEX. CONST. ART. I, § 17 provides:

> No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . .

[3] *See* judgment of the trial court at Appendix C to the Petition of the City of Houston.

[4] *See* findings of fact and conclusions of law at Appendix D to the Petition of the City of Houston.

the Fourteenth Court of Appeals of the State of Texas,[5] confirms this fact.

PETITIONER'S MISSTATEMENTS OF FACT OR LAW

a) Respondents pursued state constitutional law claims at the trial of the case.[6] Moreover, the judgment **only** granted relief pursuant to the Texas Constitution. The federal constitution did not play any part in the decision of the Texas state courts.

b) Petitioner misleads this court by stating that all Respondents had to do was reflect the route of the Grand Parkway (State Highway 99)[7] on its application for subdivision plat. *See* Petition at p. 2. The uncontroverted evidence reflects that Respondents' application for a subdivision plat would never be approved by the City unless Kolb dedicated (gave or donated) a right-of-way to the City for a state highway. (RR 21-24; 29-30; 113-115; 126-129; 131-134; & 310-314)

c) Petitioner misrepresents the application of federal law by the Supreme Court of Texas in *Mayhew v. Town*

---

[5] *See* opinion of the Fourteenth Court of Appeals at Appendix A to the Petition of the City of Houston.

[6] While the Original Petition filed by Respondents referred to the United States Constitution, Respondents only pursued "taking or damaging" claims pursuant to TEX. CONST. ART. I, § 17 at trial.

[7] The Grand Parkway is a six (6) lane controlled access highway of the State of Texas. *See* Findings of Fact 1 and 2 CR 348.

of Sunnyvale, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 119 S. Ct. 2018 (1999).[8]

Petitioner, in quoting from the *Mayhew* opinion at page 8 of its Petition, leaves out significant language in the court's opinion in an apparent effort to distort the action of the Supreme Court of Texas and create a false impression with this Court.[9] These deletions are significant because the *Mayhew's* regulatory taking claims were at all times asserted under the Fifth and Fourteenth Amendments of the United States Constitution, to include claims involving federal procedural due process, federal substantive due process, equal protection and federal taking claims. In the instant case, the Kolb judgment is based on a Texas constitutional claim and not any federal claim.

STATEMENT

In 1973, Kolb purchased 640 acres of land for investment purposes. (RR 120, 134) Thereafter, the northern half of the property was developed as a residential subdivision. (RR 121-122) In 1993, Kolb sought to develop the remaining 314 acres of land, which are the subject of this case, as a residential subdivision. (RR 122-123) The Kolb property is located within the extraterritorial jurisdiction (ETJ) of the City. (RR 300) In order for the property to be subdivided within the ETJ of the City, an application for

---

[8] Petitioner also fails to inform the Court that it denied the Petition for a Writ of Certiorari in *Mayhew*.

[9] . . . in determining the ripeness of . . . [Petitioner deleted *"Mayhews"*] regulatory taking claims . . . [Petitioner deleted *"in this case"*] we apply federal jurisprudence. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d at 929 n. 1.

subdivision plat must be submitted and approved by the City. (RR 299) (P. Exh. 34) No property may be subdivided within the ETJ of the City unless the City approves an application for subdivision plat. (RR 109, 112, 299-300) Kolb submitted two applications to subdivide their property to the City. (P. Exh. 10, 17) The City, by and through its Planning Commission,[10] denied both applications. (P. Exh. 13, 18) The initial application was denied because Kolb would not dedicate a right-of-way for the proposed Grand Parkway (State Hwy. 99) and due to excessive block lengths. Kolb resubmitted the application eliminating the excessive block lengths but legitimately refused to dedicate a right-of-way for the proposed Grand Parkway. (P. Exh. 17) The sole basis for the denial of the application for subdivision plat on the second and final submission was the fact that Kolb did not dedicate a right-of-way for the proposed Grand Parkway (State Hwy. 99). (RR 29, 30, 113-115, 126-129, 131-134, 310-314)

The Grand Parkway is a controlled access highway (i.e., limited access only) of the State of Texas which is proposed to cross the Kolb property at some time in the indefinite future. (P. Exh. 3; RR 19, 21, 55, 57-59, 78, 303) It is uncontroverted that the subdivision of the Kolb property would increase the acquisition costs of the right-of-way for this state highway. (RR 69, 87) The City made it clear that the Kolb application would *never* be approved unless a right-of-way for the Grand Parkway was dedicated. (RR 113-115, 126-129, 131-134, 310-314) The City

---

[10] The Planning Commission is the organization within the City which has the authority to approve or deny subdivision plats. (RR 10).

never retreated from this requirement. (RR 113-115, 126-129, 131-134, 310-314) Petitioner, in its Petition, repeatedly[11] seeks to mislead this Court by implying that all Kolb had to do was draw some lines on a piece of paper to comply with the requirements of the City's Major Thoroughfare Plan and obtain approval of the application. The position of the City was, and has always been, that the dedication of a "right-of-way" for the Grand Parkway was necessary in order to obtain approval of the application for subdivision plat. (RR 113-115, 126-129, 131-134, 310-314) This it had no legal authority to do.

While the City had the exclusive authority to approve or deny the Kolb application for subdivision plat, only the State of Texas had the exclusive authority, pursuant to Texas law,[12] with respect to the location and operation of a controlled access highway such as the Grand Parkway. (RR 25, 300) (RR 304-305) The City, acting in concert with the State, had an established policy of seeking the advice of the Grand Parkway Association, with respect to applications for subdivision plats involving property which might be traversed by the proposed Grand Parkway. (P. Exh. 7; RR 20, 28-29, 46-52)

On August 12, 1993, in response to the City's request, J. L. Coffman, Executive Director of the Grand Parkway Association, advised the City that the Grand Parkway Association objected to the Kolb subdivision plat since it

---

[11] *See* p. i, 2, 4, 10 and 11 of the Petition.

[12] *See* Articles 6674w and 6674w-1 of the Revised Civil Statutes of Texas.

would prohibit use of the Grand Parkway alignment corridor as proposed. (P. Exh. 12; RR 61-62) Mr. Coffman and Mr. J. R. Collins, engineering consultant for the Grand Parkway Association, both testified under oath that it was the policy of the Grand Parkway Association to protect the alignment of the Grand Parkway corridor in an attempt to reduce the acquisition costs of right-of-way for the proposed Grand Parkway in the future. (RR 69, 86-88)

Robert Litke, Director of the City's Planning Department, testified that without a dedication of land for the Grand Parkway the Kolb subdivision plat would not be approved by the City. (RR 305-306, 112-114) Mr. Litke further testified that the Grand Parkway is not a major thoroughfare of the City and that the exclusive jurisdiction for a controlled access highway of the State of Texas, such as the Grand Parkway, is with the State Highway Department. (RR 304-305) Additionally, Mr. Litke testified that it would have been futile for Kolb to request a "variance".[13]

Texas law does not permit a governmental entity to deny a development permit in order to decrease the cost

---

[13] Mr. Litke testified as follows:

Q. But you couldn't apply for a variance because a variance wouldn't apply?

A. A variance would not apply in this case.

Q. So it would be futile to apply for a variance. We can agree on that?

A. Because a variance would not apply in this case.

(RR 115, l. 14-19)

of future acquisition of land for a public use. This has been held to be a "taking or damaging" under Article I, Section 17 of the Texas Constitution. *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978) (denial of permit to protect scenic easement); *State of Texas v. Biggar*, 873 S.W.2d 11, 13 (Tex. 1994) (denial of easement exchange); *San Antonio River Authority v. Garrett Bros.*, 528 S.W.2d 266 (Tex. Civ. App. – San Antonio 1975, writ ref'd n.r.e.) (denial of subdivision plat to lower costs for future dam site and recreational lake).

Pursuant to controlling Texas case law, the Texas courts correctly determined that the actions of the City in denying Kolb's second application for subdivision plat was an unreasonable interference with the right to use and enjoy the property which was done in part to decrease the costs of acquisition of right-of-way for the Grand Parkway and thereby constituted a "taking" or "damaging" of Kolb's property within the meaning of Article I, Section 17 of the Texas Constitution. (CR 313) The Texas Court also correctly determined that the case was ripe.

REASONS FOR DENYING THE PETITION

A. No Jurisdiction.

This Court does not have jurisdiction, as the Kolb claims are not interwoven with federal law, nor do they rest primarily on federal law. The Kolb claims are state claims. The citation of decisions of this Court in a case, cited by the Texas state court does not create federal question jurisdiction.

The cases relied upon by Petitioner[14] to assert federal jurisdiction are not applicable to Kolb's state constitutional claim. Each of the cases cited by Petitioner involve the invasion of First Amendment or Fourth Amendment rights in which the state courts were compelled to apply federal jurisprudence. The Kolb judgment is based upon the application of Article I, Section 17 of the Texas Constitution. Not one federal case is cited by the Fourteenth Court of Appeals in its decision that the Kolb case was "ripe" pursuant to state ripeness requirements. In *Mayhew*, the Texas Supreme Court made it clear that it looked to federal law for "**guidance**" and did not state that it was "**compelled**" to decide the case based on federal law.

Such action by the Texas Supreme Court in *Mayhew* was appropriate because *Mayhew*, at all times, pursued federal constitutional claims, including federal taking, procedural due process, substantive due process and equal protection claims pursuant to the Fifth and Fourteenth Amendments of the United States Constitution. Kolb only pursued state constitutional claims for a "taking or damaging" at trial, and therefore, none of the Texas courts below were required, nor did they indicate any compulsion, to apply federal law to the facts of the Kolb case.

The cases of *Long, Milkovich and Zacchini*, cited by Petitioner do not apply nor create federal jurisdiction in this case.

---

[14] *Michigan v. Long*, 463 U.S. 1032 (1983); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

In *Long*, this Court said:

> It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. 463 U.S. at 1041 (1983).

Additionally, Rule 14(g)(i) of the Rules of the Supreme Court of the United States, required Petitioner to state when and the manner in which a federal question was raised in the state courts below. No federal question was ever raised by Petitioner in this case at any stage of the state court proceedings from the entry of judgment through the denial of the Petition for Review by the Supreme Court of Texas. Since no federal question was timely or properly raised, this Court should deny the Petition.

Even if the mere citation of *Mayhew* was enough to confer federal court jurisdiction, the court below correctly decided the case. The city planning commission, the body having the final say, twice denied Kolb's development application. As found by the courts below, any further action (without donating the right-of-way) would have been futile. The case was clearly ripe under state and federal law.[15]

B. No Compelling Reason Exists to Grant the Petition.

No compelling reason exists for granting the Petition. No issue of importance to federal jurisprudence was

---

[15] The Texas Supreme Court did not regard this case as worthy of its discretionary review nor should this Court.

presented in this case. This case simply involves the application of well-established Texas law to the facts.

Under Texas law, a governmental entity cannot deny a private development permit to reduce future acquisition costs of the property for a public project.

In *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978), a case involving the denial of a permit for waterway development to protect a scenic easement, the Supreme Court of Texas set out the law applicable in this case:

> "There is still another test which is sometimes helpful. It allows recovery of damages when the government's action against an economic interest of an owner is for its own advantage. *Morris Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A. 2d 232 (1963); *Miller v. City of Beaver Falls*, 368 PA. 189, 82 A. 2d 34 (1951); *Cf. Griggs v. Allegheny County*, 369 U.S. 84, 82 S. Ct. 531 (1962). A recent application of that test is found in *San Antonio River Authority v. Garrett Brothers*, 528 S.W.2d 266 (Tex. Civ. App. – San Antonio 1975, writ ref'd n.r.e.). In that case the City of San Antonio rejected plans for a proposed subdivision because the city was planning sometime in the future to acquire the land by eminent domain for a dam site and a lake or reservoir for recreation purposes. By suppressing development of the area, the City of San Antonio would keep down its costs when it exercised its powers of eminent domain." *Id.* at 393.

This constituted a "taking or damaging" of property under the Texas Constitution.

This rule was restated in *State of Texas v. Biggar*, 873 S.W.2d 11, 14 (Tex. 1994). There the Supreme Court of Texas in holding that the denial of an easement exchange resulted in compensable damages under the Texas Constitution said:

> "Here, Landowners presented evidence the State denied the easement exchange to reduce the cost to the public of acquiring a portion of the Landowners' land. *In the same stroke, the State managed to foreclose all opportunity to develop, causing the concomitant reduction in value of not only the portion taken, but the entire Biggar tract.* We hold the State's actions resulted in compensable damages under Article I, Section 17 of the Texas Constitution." *Id.* at 14. (emphasis added).

This is exactly what the City sought to do in this case.

The Texas Courts below correctly determined that Kolb's claims, under the Texas Constitution, were ripe for determination pursuant to state law. All elements necessary to satisfy the state ripeness requirements stated by the Texas Supreme Court in *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 119 S. Ct. 2018 (1999) were met by Kolb. This Court does not sit to examine every state court record to determine "ripeness" under state claims.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

W. ALLYN HOAGLUND
Counsel of Record
3030 Two Houston Center
Houston, Texas 77010
(713) 655-7744

Attorney for Respondents John E. Kolb, James W. McCartney, William M. Linden, Raymond S. Maislin, O. Scott Rogers, Betty Pulaski Weston, B. Red, Inc., Rachel S. Kolb, Dave Kaminsky, Robert I. Kaminsky, Stephen Kaminsky, Charles D. Kolb, James R. Sud, Trustees of the Judith Sud & Betty P. Sud Trust, and J. E. Roussel

(3)

FILED
JAN 2 2000
CLERK

No. 99-1690

In The

Supreme Court of the United States

CITY OF HOUSTON,

Petitioner,

v.

JOHN E. KOLB, JAMES W. McCARTNEY, WILLIAM M. LINDEN, RAYMOND S. MAISLIN, O. SCOTT ROGERS, BETTY PULASKI WESTON, B. RED, INC., RACHEL S. KOLB, DAVE KAMINSKY, ROBERT I. KAMINSKY, STEPHEN KAMINSKY, CHARLES D. KOLB, JAMES R. SUD, TRUSTEES OF THE JUDITH SUD & BETTY P. SUD TRUST, AND J. E. ROUSSEL,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fourteenth Supreme Judicial District Of Texas

PETITIONER'S REPLY BRIEF

C. ROBERT HEATH
Counsel of Record
BICKERSTAFF, HEATH, SMILEY, POLLAN, KEVER & McDANIEL, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701-2443
(512) 472-8021
(512) 320-5638 [Fax]

ANTHONY W. HALL, JR.
City Attorney
ANDREA CHAN
Assistant City Attorney
City of Houston, Texas
Legal Department
P.O. Box 1562
Houston, Texas 77251-1562
(713) 247-2000
(713) 247-1017 [Fax]

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

The Brief in Opposition Misunderstands the *Michigan v. Long* Doctrine.

Article I, section 17, of the Texas Constitution, which was the sole provision cited in the district court judgment, may be an adequate state ground for decision. It must, however, also be an independent ground if the case is to fall outside this Court's jurisdiction. Here, it clearly is not an independent ground as federal and state law are intertwined. This is apparent when one looks to *Mayhew*, the Texas Supreme Court case that establishes the Texas rule for ripeness of regulatory takings claims and that was the basic authority for the Texas court of appeals' decision in *Kolb*. There is no question that it is appropriate to look to the rationale of the cases cited by the challenged opinion to determine if federal and state law are intertwined for purposes of the *Michigan v. Long*[1] analysis. *E.g.*, *Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 10 n.5 (1990). In *Mayhew*, the plaintiff asserted and the court decided both state and federal takings claims. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 927-28, 940 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999). The Texas Supreme Court expressly based its decision on the state ripeness issue on federal law. *Id.* at 929 n.1. The Texas ripeness standard set out in *Mayhew*, and relied on by the court of appeals, is, at the very least, intertwined with federal law. Where the state court interprets its own constitution in the manner it believes federal law requires, the state law does not provide an independent basis for decision, and

---

[1] 463 U.S. 1032 (1983).

this Court has jurisdiction to review the case. *E.g., Delaware v. Prouse*, 440 U.S. 648, 652-53 (1979) (cited with approval in *Michigan v. Long*, 463 U.S. at 1038 n.4, 1042 n.8).

Kolb argues that the *Mayhew* court brought the Texas ripeness rule out from under the *Michigan v. Long* presumption because it "made it clear that it looked to the federal law for '**guidance**' and did not state that it was '**compelled**' to decide the case based on federal law." Brief in Opposition at 8. Kolb both misreads *Mayhew* and turns the *Michigan v. Long* rule on its head. The *Mayhew* court used the word "guidance" only once in its opinion, and that was in a parenthetical explanation to a *"cf"* citation. *Mayhew*, 964 S.W.2d at 929. All the court said was that it had looked to federal law for guidance in deciding *another* case involving *another* issue – i.e., standing. This is hardly a "plain statement . . . that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached," as required by *Michigan v. Long*. *Long*, 463 U.S. at 1041.

Certainly, the second half of the *Michigan v. Long* requirement – i.e., a statement that federal law does not compel the result – is not satisfied by *Mayhew*. In fact, *Mayhew* expressly states that *"we need not determine whether we are compelled by federal supremacy to rely on federal law* because, in determining the ripeness of the Mayhews' regulatory takings claims in this case, we apply federal jurisprudence." *Mayhew*, 964 S.W.2d at 929 n.1 (emphasis added). The problem with Kolb's argument in his brief in opposition is that he has this part of the *Michigan v. Long* test backwards. If the Texas Supreme Court wanted to avoid application of the *Michigan v. Long*

presumption, it was required to expressly state in its opinion that it was not compelled by federal law to decide the case the way it did. By expressly indicating that it was *not* making such a statement, it precluded an escape from the *Michigan v. Long* presumption that this Court has jurisdiction to review the case.

The Brief in Opposition Focuses on Irrelevant and Non-existent Issues and Largely Ignores the Ripeness Issue Raised by the Petition.

The city's petition is based on its assertion that Kolb's takings claim was not ripe. The brief in opposition largely ignores the central issue of ripeness and instead focuses on peripheral points and on issues the trial and appellate courts would never have reached had they properly determined that the claim was not ripe. *E.g.*, Brief in Opposition at 10-11.

Kolb claims that the city "misleads this court by stating that all [he] had to do was reflect the route of the Grand Parkway (State Highway 99) on [his] application for subdivision plat." Brief in Opposition at 2 (footnote omitted). Kolb misses the point. No one has suggested that amending the application to show the route of the freeway would guarantee approval. An amended application might or might not be approved. It would, however, give the city the opportunity to decide what use, if any, of the property will be permitted. Until the city has the opportunity to make that decision, a court has no way to know what, if anything, has been taken, and the claim is not ripe.

Kolb suggests that he is excused from ever submitting a meaningful application since the court found that

no application would be approved absent a dedication of right-of-way for the freeway. Brief in Opposition at 9. That finding, however, is based on the statements of city staff members, not on the final and authoritative determination by the decision-making body required by this Court's ripeness jurisprudence. Pet. 12-14. Further, even if it were appropriate to find that the city would impose this requirement without evidence of any formal or informal action by the city's decision-makers, the case would still not be ripe. This is not an exaction case in which a landowner objects to a city's requirement that land be dedicated. The plaintiffs sought no damages to reflect the value of the land to be dedicated, and no property was, in fact, transferred to the city or to any other governmental entity. Instead, the plaintiffs' claim was that the failure to approve the application amounted to a taking of the value of the entire tract. That claim was not and could not be ripe until the city had an opportunity to act on a meaningful application and to determine what use of the property would be permissible.

Kolb's argument has attempted to jump past the ripeness issue and to pose the question in terms of required dedication. Before those issues can be reached, however, the cause must be ripe. By declining to file a meaningful application, Kolb prevented his claim from being ripe for judicial decision. When the focus is on the point actually raised in the petition – i.e., that the claim is not ripe – it is clear that Kolb's argument misses the mark.

Finally, Kolb asserts that the petition does not show where the federal question was raised below as required by Rule 14(g)(i). Brief in Opposition at 9. The petition, however, states in no uncertain terms that the ripeness issue in this case was decided on the basis of federal law.

Petition at 8. The petition indicated that this issue was raised in the county court, the court of appeals, and the Texas Supreme Court. Petition at 4-5, 7. Excerpts from the pleadings in each of the three Texas courts were attached to show that the ripeness issue was raised and that it was argued on the basis of federal law. Pet. App. at 39, 41, and 44.

CONCLUSION

This case decided an important federal question in a way that conflicts with relevant decisions of this Court. If left uncorrected, it will permit an erosion of a critical part of this Court's takings jurisprudence. The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

C. ROBERT HEATH
Counsel of Record
BICKERSTAFF, HEATH, SMILEY,
POLLAN, KEVER &
MCDANIEL, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701-2443
(512) 472-8021
(512) 320-5638 [Fax]

ANTHONY W. HALL, JR.
City Attorney
ANDREA CHAN
Assistant City Attorney
City of Houston, Texas
Legal Department
P.O. Box 1562
Houston, Texas 77251-1562
(713) 247-2000
(713) 247-1017 [Fax]